Filed 10/6/04 In re Emmanuel V. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re EMMANUEL V., a Person Coming Under the Juvenile Court Law.	B170679 (Los Angeles County Super. Ct. No. JJ10581)
THE PEOPLE, Plaintiff and Respondent, v. EMMANUEL V., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. H. Kirkland Jones, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

Emmanuel V. appeals from the order declaring him a ward of the court (Welf. & Inst. Code, §602) by reason of his having committed a lewd act upon a child who was under the age of 14 years (Pen. Code, § 288, subd. (a)). The juvenile court ordered suitable placement and calculated a theoretical maximum period of confinement of eight years.

On appeal, he contends that (1) the juvenile court abused its discretion by finding that the victim, E.C., age five, was competent to testify, (2) appellant's confession was involuntary, and (3) E.C.'s fresh complaint was inadmissible in evidence. We find appellant's contentions to be without merit, and we affirm the order.

THE SUMMARY OF THE ADJUDICATION EVIDENCE

Viewed in accordance with the usual rules on appeal (*In re Dennis B.* (l976) 18 Cal.3d 687, 697), the evidence established that on one weekend between October 15, 2000, and December 15, 2001, M.C. and her two children were visiting a family related to her by marriage. The families were close, and they spent the weekend together frequently and regarded one another as cousins. M.C.'s son, E.C., was four years old, and her daughter was about six years old. At that time, appellant was 15 years old. He was the son of M.C.'s cousin.

During the afternoon, M.C. and her cousin were sitting and visiting in the garage. Inside the residence, appellant's sister and E.C.'s sister were playing together in a bedroom. In the garage, E.C. said that he wanted to play with a radio control car that belonged to appellant. The cousin told appellant to lend E.C. the car and to put a battery in it before he gave it to E.C.

Appellant left the garage to get a battery from the residence, and he called to E.C. to follow him. E.C. did so. In the living room, appellant told E.C. that he would give him a car if E.C. would let appellant put his penis in E.C.'s mouth. Appellant gave E.C. a car and inserted his penis in the boy's mouth. E.C. vomited.

E.C. did not complain about the lewd act immediately. At trial, M.C. testified that that evening, in the car, when her husband was driving her family home, she commented

to E.C. that she did not understand why he had vomited. The only reason that she could think of to explain the vomiting was that E.C. might have eaten too many pancakes when they went out to breakfast. E.C. spontaneously replied that appellant had put his penis in E.C.'s mouth and that was why E.C. wanted to vomit. M.C. explained that E.C. would have known the word, "penis," which E.C. pronounced "pen-nae," because she used anatomically correct phrases in training her children. M.C. could not pin down the date when the molestation had occurred, but she knew that E.C. was four years old when appellant molested him.

M.C. testified that she had not reported the lewd act when it occurred. E.C. had complained about the molestation at school, and only then did she discuss the molestation with the authorities.

Los Angeles Police Detective Theodore Carreras testified that after the lewd act was reported, he interviewed appellant. The detective had appellant's mother bring appellant to the police station, and he interviewed appellant alone in a station interview room. He advised appellant of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), and appellant agreed to speak to the detective without an attorney present. Appellant admitted that he was alone in the living room with E.C. and that he had put his penis in E.C.'s mouth. At the detective's request, appellant reduced his confession to writing.

In defense, appellant testified that he did not commit the lewd act. He claimed that he was in the living room watching television alone. E.C. and the two little girls were there. They were eating cookies and laughing. E.C. threw up because he was eating a cookie and laughing. Appellant claimed that when he spoke to the detective, initially, he had denied the act. Then the detective told him that they had a DNA test from E.C. that proved guilt. He admitted guilt because he was confronted with the false statement. He also admitted guilt because the detective told him that if he lied, he would "give [him] more time."

During cross-examination, appellant said that prior to confessing, the detective had not mentioned the specifics of E.C.'s accusation. Appellant acknowledged that before the incident, the two families frequently socialized. However, after the incident, all contact came to a halt.

DISCUSSION

1. E.C.'s Competency As a Witness

On appeal, appellant contends that the juvenile court's ruling as to E.C.'s competency was an abuse of discretion. We disagree.

Before E.C. testified at trial, the juvenile court held a hearing about competency. Using a Spanish interpreter, E.C. testified that he presently was five years old and in kindergarten, and he promised to tell the truth.[1] The prosecutor asked E.C. questions regarding the color of his pen, and whether the prosecutor was or was not telling the truth in stating that the pen was yellow or red. E.C. replied appropriately to the prosecutor's questions, indicating when it was the truth and when it was a lie that the pen was various colors.

After listening to E.C.'s testimony, the juvenile court commented that E.C. had stated that he understood what the truth was and that he had promised to tell the truth. However, it was reserving its ruling on the issue of whether E.C. was capable of expressing himself so as to be understood until it heard E.C.'s juvenile testimony.

At the end of the prosecution's case-in-chief, defense counsel made a motion to dismiss the case on grounds of insufficient evidence based on E.C.'s lack of competency as a witness. The juvenile court ruled as follows: "I heard it, and there is testimony all over the place, but in terms of [E.C.] testifying, I am satisfied that he is competent. I heard his testimony. [¶] And, in fact, I permitted you, [defense counsel], to cross-examine up one side and down the other, and he has been very, very consistent about the

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[1] During her adjudication testimony, M.C. testified that at trial, E.C. was almost six years old.

things which are important in terms of what he said happened to him, what the motivation for that was, and many other things. When he understood what the questions were, he hung in there very carefully with his answers. [¶] I can point to a number of things. The business of counting to ten. You were never able to say that this happened more than one time, and I let you have full rein on that. [¶] . . . [¶] I am satisfied that he's totally consistent in his testimony about that. . . . [¶] This is a serious thing. I let you have full opportunity to cross-examine the witness, and you did that. And the young witness, I am satisfied, is competent. He testified to his knowledge of what occurred to him and within the context of a five-year-old. I have no question about his competency or his accuracy. . . . [¶] So the [Welfare and Institutions Code section] 701.1 motion [a motion to dismiss on grounds of insufficient evidence], denied."

In sustaining the petition, the court also said: "Again, let me go over what I saw. For a four- or five-year-old, trying to talk to kids, trying to get exactly to understand what they understand, for a four- or five-year-old, he was a good witness. He qualified that he was very good about it. And the only thing that sort of centers it for the court -- lots of things do -- but after extensive cross-examination when he was asked did he do anything else, and he said, 'Yes, he gave me the little car.' And that was in the young man's mind." The court also commented that there were "some demeanor issues which makes the court feel [that appellant] is being less than truthful."

The standard for evaluating competency is stated in *People v. Mincey* (1992) 2 Cal.4th 408, 444: "As a general rule, 'every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter.' (Evid. Code, § 700; see Pen. Code, § 1321.) A person may be disqualified as a witness for one of two reasons: (1) the witness is incapable of expressing himself or herself so as to be understood, or (2) the witness is incapable of understanding the duty to tell the truth. (Evid. Code, § 701, subd. (a).) The party challenging the witness bears the burden of proving disqualification, and a trial court's determination will be upheld in the absence of a clear abuse of discretion. [Citation.]" (Accord, *People v. Lewis* (2001) 26 Cal.4th 334,

356; *People v. Anderson* (2001) 25 Cal.4th 543, 572-573.) Unlike a witness's personal knowledge, a witness's competency to testify is determined exclusively by the trial court. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 356.)

Appellant urges that the record is devoid of evidence that E.C. was competent because E.C. had almost no ability to recollect and to narrate and there was no indication that he understood the consequences associated with lying. Appellant argues that the record supports his contention because of the many inconsistencies in E.C.'s testimony during cross-examination and because E.C. could not distinguish between the day of the event and the day of his testimony. He also asserts that during the section 402 hearing, on one occasion, E.C. gave no audible response when asked the abstract questions of whether he knew the difference between telling the truth and lying and whether he knew what happened if one lies or tells the truth.

Applying the principles stated in *Mincey*, appellant has not carried his burden of showing incompetence. At the adjudication, E.C. was almost six years old. Defense counsel and the juvenile court agreed that as a witness, E.C. had difficulty responding during cross-examination to defense counsel's abstract questions and that E.C. was easily confused and his testimony was often inconsistent. However, when the parties questioned E.C. in a concrete fashion easily understood by a five year old, E.C. had no difficulty relating the truth about the event and responding appropriately to the party's questions. During the adjudication, the juvenile court observed E.C.'s demeanor and found that he performed well for a five year old. The court also determined that E.C. understood his duty to tell the truth and that he was able to communicate the basics of his encounter with appellant in a consistent manner. E.C. had no difficulty in describing that the prosecutor was telling the truth when the prosecutor said his pen was yellow or in telling the events of the sexual molestation and with whom he had discussed the event. The record supports the juvenile court's findings, and there was no abuse of discretion when the juvenile court concluded that E.C. was competent to testify as a witness at the adjudication. (*People v. Mincey, supra,* 2 Cal.4th at pp. 444-445; *People v. Roberto V.*

(2001) 93 Cal.App.4th 1350, 1368-1369 [stating that whether a four- or five-year-old child is a competent witness is discretionary with the trial court].)

2. The Confession

Appellant contends that "the written confession was the result of illegal police deception and/or promises of leniency," and thus it was inadmissible in evidence. We disagree.

A. The Facts

Prior to trial, appellant moved to suppress his confession on grounds of involuntariness.

At the time of the police interview, appellant was age 16. Detective Carreras had telephoned appellant's mother and asked her to bring appellant to the police station. They arrived at the station at approximately 9:00 a.m. on the morning of the interview. Detective Carreras had appellant speak to him alone in a station interview room and had appellant's mother wait outside.

According to the detective, the interrogation lasted approximately three to four hours. Initially, the detective told appellant why he had been called in -- the detective said appellant was to be charged with a lewd act with a child and explained the general nature of such misconduct. He did not go into any detail. Detective Carreras could not recall if appellant initially denied the charges. He only recalled telling appellant that "we wanted the truth, what we were there for is the truth," admonishing appellant with the *Miranda rights*, and obtaining a waiver of constitutional rights. Thereafter, appellant made his oral confession, and the detective had appellant reduce his statement to writing.

Detective Carreras admitted that during the interview, he had told appellant that "it was better" to tell the truth. However, he denied using other verbal inducements to secure the confession. When the detective spoke to appellant, he understood that a detained petition would be filed. The detective had nothing to do with whether after detention, appellant would be released to his parents.

Appellant testified on his own behalf and agreed that Detective Carreras had told him he was being interviewed because "they're filing charges on you." Appellant claimed that he denied wrongdoing. The detective told him that it was "better to tell the truth." Also prior to the interview, the detective said to him: "It's better for you if you tell the truth, so it could make it easier for him. He said either way, if [appellant told] the truth or not, [appellant would] still [be] going to go to jail. He said if [appellant lied] to him, [appellant would] do more time."

Appellant claimed that he repeatedly told the detective that he did not commit the lewd act. The detective responded that they had "a DNA test about the little boy." Appellant testified that he had written the statement because that was what he was told to do.

On cross-examination, appellant admitted that Detective Carreras did not tell him what to write and that he was not forced to write a statement.

Appellant's mother testified that she was aware of the reason for taking her son to the police station, but she did not tell appellant why he was there. She claimed that the interview had lasted approximately two hours.

Defense counsel argued that the detective had a "selective" memory of the events of the interview, and the interview was lengthy. Counsel argued that appellant initially denied wrongdoing, and the statement was induced by promises of leniency and coercion -- that it would be better for appellant to talk, and if he lied, appellant would be doing "time in jail."

The court denied the motion, commenting that urging someone to tell the truth did not amount to coercion. The court rejected appellant's claims regarding a threat of confinement and found that appellant was told only that regardless of whether he told the truth, he would be detained. The court said that even if the detective employed a ruse with regard to the DNA test, police claims that they have incriminating evidence do not render a statement involuntary.

B. The Guiding Legal Principles

The decision in *People v. Maury* (2003) 30 Cal.4th 342, 404-405, explained: "In reviewing the voluntary character of incriminating statements, '"[t]his court must examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden and proved that the statements were voluntarily given without previous inducement, intimidation or threat. [Citations.] . . . 'In order to introduce a defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] . . .'

"A statement is involuntary if it is not the product of '"a rational intellect and free will."' (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.) The test for determining whether a confession is voluntary is whether the defendant's 'will was overborne at the time he confessed.' (*Lynumn v. Illinois* (1963) 372 U.S. 528, 534.) '"The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were 'such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined.' [Citation.]" [Citation.] In determining whether or not an accused's will was overborne, "an examination must be made of 'all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation.' [Citation.]" [Citation.]' (*People v. Thompson* [(1990) 50 Cal.3d [134,] 166.)

"A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. (*People v. Benson* (1990) 52 Cal.3d 754, 778], citing *Colorado v. Connelly, supra* [(1986)] 479 U.S. [157,] 167.) A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. (*Benson, supra*, at p. 778.) Although coercive police activity is a necessary predicate to establish an involuntary confession, it 'does not itself compel a finding that a resulting confession is involuntary.' (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) The statement and the inducement must be causally linked. (*Benson, supra*, at pp. 778-779.)"

C. The Analysis

The juvenile court found the statement to be voluntary. Implicit in that determination were the court's findings that appellant had been properly admonished with his *Miranda* rights and that he had knowingly, intelligently, and voluntarily waived those rights. The finding of a valid *Miranda* waiver is highly persuasive in demonstrating voluntariness. While a finding of a proper *Miranda* waiver does not preclude a finding of coercion, such a case is rare. (*Dickerson v. United States* (2000) 530 U.S. 428, 444 ["'[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare'"].)

Further, the juvenile court made factual findings that a reviewing court cannot ignore. (*People v. Hogan* (1982) 31 Cal.3d 815, 835.) The juvenile court found that all Detective Carreras did prior to appellant's statement was to tell appellant that it was better to tell the truth and to tell appellant essentially that it would do no good to protest his innocence as the police had a determinative DNA test that showed he was guilty. We decline appellant's invitation to consider facts about appellant's age, maturity, and intellect that are contained the probation report as they were not considered by the juvenile court in ruling on the motion.

In deciding whether a defendant's will was overborne, courts examine "all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; see also *People v. Benson*, *supra*, 52 Cal.3d 754, 779.) Characteristics of the accused which may be examined include the accused's age, sophistication, prior experience with the criminal justice system and emotional state. (*Stein v. New York* (1953) 346 U.S. 156, 185-186; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 208-209.) The juvenile court had certain clues about appellant's maturity and intellect from his demeanor in court and from his testimony. We will not assume that the trial court ignored its own observations of appellant in determining the issue of voluntariness.

Also, impermissible police conduct is a prerequisite to finding a confession is coerced. (*Colorado v. Connelly, supra,* 479 U.S. at p. 167; *People v. Benson, supra,* 52 Cal.3d at pp. 778-779.) The officer's statement was not of a sort likely to produce an unreliable or false statement, and thus the detective's deceptive comment about the DNA test did not amount to impermissible police conduct. (*People v. Thompson, supra,* 50 Cal.3d at p. 167 [officers repeatedly lied to defendant, claiming they had incriminating evidence linking him to homicide]; *People v. Watkins* (1970) 6 Cal.App.3d 119, 124-125 [although no fingerprints were found, the interrogating officer told the defendant that his fingerprints were found on the getaway car].) The mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise also does not constitute improper police conduct. (*In re Shawn D., supra*, 20 Cal.App.4th at p. 210.)

When we measure the facts found by the trial court and the undisputed facts from the transcript of appellant's confession against the legal standard for determining voluntariness, we conclude that appellant made a voluntary, knowing, and intelligent *Miranda* warning and that his confession was voluntary. (*People v. Maury, supra*, 30 Cal.App.4th at pp. 404-405 [standard for establishing voluntariness]; see also, *People v. Whitson* (1998) 17 Cal.4th 229, 247 [stating the standard for a valid *Miranda* waiver]; accord, *Moran v. Burbine* (1986) 475 U.S. 412, 421, 422-423 [stating the federal standard for a valid *Miranda* waiver].)

3. The Fresh Complaint Testimony

Appellant contends that the hearsay exception codified in Evidence Code section 1360 is narrow, and the court abused its discretion by overruling appellant's "hearsay" objection to M.C.'s testimony about E.C.'s fresh complaint.[2]

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[2] Unless otherwise specified, all further statutory references are to the Evidence Code.

During the adjudication, M.C. testified that on the evening after E.C. vomited at appellant's residence, E.C. spontaneously blurted out in the family car that he had vomited because appellant put his penis in E.C.'s mouth. Prior to the testimony, appellant objected on grounds of hearsay, and the juvenile court overruled the objection.

Section 1360, concerning a statement describing child abuse or neglect made by a child under the age of 12, provides in pertinent part: "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child either: [¶] (A) Testifies at the proceedings. [¶] (B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child."

We do not have to address the respondent's claim of waiver or appellant's contention of inadmissible hearsay. (See *People v. Roberto V.*, *supra,* 93 Cal.App.4th 1350, 1373-1374 [requirements for the admission of a fresh complaint pursuant to section 1360]; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 445 [the same].) Even if the use of this fresh complaint evidence was error, it was not prejudicial. The fresh complaint added little to the proof of guilt. At the adjudication, E.C. gave a concise statement describing how appellant had molested him. Apart from his mother's testimony about a fresh complaint, E.C. testified that he made a fresh complaint to his parents after the molestation. The mother never reported the lewd act to authorities, but E.C. told someone about the lewd act at school, and school authorities reported it. Appellant made a voluntary statement confessing his guilt. In his own testimony, appellant acknowledged that the constant socializing between the two families had

abruptly come to a halt after E.C. made his complaint. The other evidence adequately corroborates E.C.'s complaint. On this record, the evidence of guilt was overwhelming, and the fresh complaint evidence was merely cumulative of other evidence that corroborate that the molestation had occurred. Accordingly, any improper use of the fresh complaint evidence is harmless beyond a reasonable doubt. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140; *People v. Schmaus* (2003) 109 Cal.App.4th 846, 860.)

DISPOSITION

The order under review is affirmed.

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_____, J.

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We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST